IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MICHAEL T. BROOKS,

Plaintiff,

v.

AGATE RESOURCES, INC., dba Trillium Community Health Plan

Defendant.

Civ. No. 6:15-cv-00983-MK

FINDINGS AND RECOMMENDATIONS

KASUBHAI, Judge:

Defendant moves for dismissal of Plaintiff's case in its entirety under Federal Rules of Civil Procedure 12(b)(6) and 12(c) for failure to state a claim or judgment on the pleadings in its favor on each of Plaintiff's twelve claims. For the reasons that follow, this Court should grant Defendant's motion and dismiss Plaintiff's Amended Complaint with prejudice because Plaintiff fails to state a claim satisfying the requirements of Federal Rule of Civil Procedure 8.

BACKGROUND

Since the termination of his employment on September 27, 2013, Plaintiff has filed multiple lawsuits against his former employer, claiming that Defendant violated numerous state and federal statutes. Mot. Dismiss 1-2, ECF No. 137. To date, Plaintiff has filed several actions in federal court, with the United States Department of Labor ("DOL"), the Equal Employment Opportunity Commission ("EEOC"), and the Oregon Bureau of Labor and Industries ("BOLI"). *Id.* Plaintiff's cases range from whistleblower retaliation claims to discrimination claims, to claims alleging securities fraud and violations under Sarbanes-Oxley ("SOX") and HIPAA. *Id.* Since

filing the present case on June 4, 2015, Plaintiff has received the assistance of five attorneys, who represented him through the majority of this litigation. *Id.* Plaintiff now proceeds pro se. *Id.*

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) provides that "before pleading if a responsive pleading is allowed," "a party may assert . . . by motion" the defense of "failure to state a claim upon which relief can be granted." Rule 12(c), in turn, states that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Motions brought under the two rules are evaluated according to virtually the same legal standard. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 (9th Cir. 2011); *Jones v. Nat'l R.R. Passenger Corp.*, No. 15-cv-02726-MEJ, 2016 WL 4538367, at *2 (N.D. Cal. Aug. 31, 2016) (citing *Dahlia v. Rodriguez*, 735 F.3d 1060, 1076 (9th Cir. 2013), in describing standards applicable to motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c)).

Thus, the Court should dismiss each claim that does not contain enough facts to state a claim for relief that is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Court must accept as true allegations in the complaint, unless contradicted by a document that is authentic and integral to Plaintiff's claims. *Dent v. Cox Commc'ns Las Vegas, Inc.*, 502 F.3d 1141, 1143 (9th Cir. 2007). And while the Court must construe all inferences in the light most favorable to the nonmoving party, *Godwin v. Rogue Valley Youth Corr. Facility*, No. 1:12-cv-00478-CL, 2013 WL 3712413, at *2 (D. Or. July 12, 2013), "it is within [the Court's] wheelhouse to reject, as implausible, allegations that are too speculative to warrant further factual development," *Dahlia*, 735 F.3d at 1076.

Further, the Court need not accept conclusory allegations, unreasonable inferences, or legal conclusions set out in the form of factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Cafasso*, 637 F.3d at 1054; *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012) ("Mere conclusory statements in a complaint and 'formulaic recitation[s] of the elements of a cause of action' are not sufficient." (brackets in original) (quoting *Twombly*, 550 U.S. at 555)); *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) ("[B]are assertions . . . amount[ing] to nothing more than a formulaic recitation of the elements of a . . . claim . . . are not entitled to an assumption of truth." (internal quotation marks omitted; first ellipsis and second brackets in original) (quoting *Iqbal*, 556 U.S. at 678)). A court therefore "discounts conclusory statements, which are not entitled to the presumption of truth, before determining whether a claim is plausible." *Chavez*, 683 F.3d at 1108 (citing *Iqbal*, 556 U.S. at 678). Further, "'[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' 'Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Id.* at 1108-09 (citation omitted; ellipsis in original) (quoting *Iqbal*, 556 U.S. at 679). The point of this critical gatekeeping function is to ensure that claims are sufficiently plausible "such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

Finally, in ruling on motions under Rules 12(b)(6) and 12(c), a court may consider materials outside of the complaint if the plaintiff refers extensively to it in the complaint, if it is integral to the plaintiff's claim, or if the court may take judicial notice of it. *See Godwin*, 2013 WL 3712413, at *2; *see also* Req. Judicial Notice and cases cited therein.

DISCUSSION

As a threshold matter, this Court's Order (ECF No. 197) granted Defendant's Request for Judicial Notice (ECF No. 138). This Findings and Recommendation refers to exhibits provided therein throughout the analysis of this case.

A. First Claim for Relief: Plaintiff's Discrimination Claims Fail Because the Court Lacks Subject Matter Jurisdiction, and Plaintiff Fails to State a Claim for which Relief Can Be Granted.

1. Plaintiff Failed to Timely File an Administrative Charge Regarding His Race, National origin, or Religious Discrimination Claims.

In Count One of his Amended Complaint, Plaintiff alleges that Defendant discriminated against him on the basis of race or national origin, violating Title VII, 42 U.S.C. § 2000e-2. Am. Compl. ⁋⁋ 8-16, ECF No. 135. Count Two alleges religious discrimination, although Plaintiff does not identify the statutory basis for this count, and neither count identifies which subsection of Section 2000e-2 applies here. *Id.* at ⁋⁋ 8-20. The Court adopts Defendant's analysis and treats both counts as assertions of violations of Section 2000e-2(a)(1). *See* Mot. Dismiss n. 11, ECF No. 37. Plaintiff's Amended Complaint is the first time Plaintiff alleges racial, ethnic, or religious discrimination.

Prior to commencing a lawsuit asserting a Title VII claim, a plaintiff must exhaust his administrative remedies by filing a charge with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). A plaintiff must initiate an action in federal court within 90 days after the EEOC issues a notice of right to sue. *Id.* § 2000e-5(f). A plaintiff's failure to do so is a jurisdictional defect. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973). *McDonnell Douglas* stands for the proposition that a plaintiff's claims are not limited "to those charges as to which the [EEOC] has made findings of reasonable cause." 411 U.S. at 798. Plaintiff relies on this proposition in his Response. 63-63, ECF

No. 151. But it does not hold that a plaintiff may assert claims that were not raised at all before the EEOC. To the contrary, any theory of liability not presented to the EEOC is barred from a subsequent lawsuit. *See, e.g.*, *Wilder v. Ariz. Bd. of Regents*, 510 F. App'x 535, 537 (9th Cir. 2013) ("The district court lacked subject matter jurisdiction over Cameron's Title VII gender discrimination claim because Cameron included no allegation of gender discrimination in her administrative charge before the Equal Employment Opportunity Commission (EEOC)." (citing *Lowe v. City of Monrovia*, 775 F.2d 998, 1003-04 (9th Cir. 1985))).

Plaintiff filed a complaint with the EEOC on January 21, 2014, after he filed a BOLI Complaint on January 13, 2014; as the EEOC letter of April 22, 2015 notes, the "EEOC and BOLI operate under a work sharing agreement, which means that when you filed your charge with BOLI, that same charge was automatically co-filed with the EEOC at the same time," rendering the EEOC complaint duplicative. Compl. Ex. 1, ECF No. 1. Plaintiff was terminated from his job on September 27, 2013. Although that time is within the 180 days required to file a BOLI/EEOC complaint, Defendant argues that Plaintiff failed to exhaust his administrative remedies on these claims because the charge he filed with the EEOC did not identify race, national origin, or religion as bases of the alleged discrimination. Mot. Dismiss 6-7, ECF No. 137. As a result, the EEOC did not investigate those charges, and this Court finds that Plaintiff is now barred from asserting those claims in this lawsuit. *See Vasquez v. Cty. of L.A.*, 349 F.3d 634, 644-45 (9th Cir. 2003), *as amended* (Jan. 2, 2004) ("We conclude that Vasquez did not exhaust his administrative remedies regarding retaliation for filing the discrimination charge . . . [because he] checked the box on the form for discrimination based on national origin but did not check the box for retaliation.").

As stated above, when Plaintiff initiated this suit in federal court on June 4, 2015, he did not assert claims of discrimination based on race, national origin, or religion. Compl., ECF No. 1.

Plaintiff did not check the box for "Title VII" in the Form Complaint that he originally filed, and he did not identify his race/color, national origin, or religion as a basis for the discrimination he alleges he suffered. *Id.* The Supplement that accompanied the Form Complaint also did not contain any facts suggesting that Plaintiff was discriminated against for any of these reasons. Plaintiff alleges race, national origin, and religious discrimination claims for the first time in his Amended Complaint, filed May 12, 2018, nearly three years after his initial complaint. Thus, he did not timely assert discrimination claims within 90 days of his right to sue letter, even had he properly alleged racial, national origin, or religious discrimination claims with the EEOC. *See* Compl. Ex.3 at 23, ECF No. 1. Given that Plaintiff alleges no facts that plausibly state a claim for racial, national origin, or religious discrimination in the original complaint, these claims, to the extent they are alleged in the operative Amended Complaint, do not relate back to his original filing.

Plaintiff attaches to the Amended Complaint the Notice of Charge of Discrimination that he filed with the EEOC, dated January 23, 2014. *See* Am. Compl. Ex. 3, ECF NO. 135. Although Plaintiff checks the box for "Title VII of the Civil Rights Act," he does not identify "race," "religion," or "national origin" as the circumstances of the alleged discrimination. *See id*. There are no allegations in the Amended Complaint (including those in the "Procedural Requirements" section of the pleading) that suggest that such claims were made to or investigated by the EEOC.

This Court finds that it lacks subject matter jurisdiction over Plaintiff's Title VII race, national origin, and religious discrimination claims because Plaintiff failed to allege such discrimination to the EEOC and therefore cannot properly raise them here for the first time. Further, even if the claims were properly raised and evaluated by the EEOC, Plaintiff failed to file racial, national origin, or religious discrimination claims within the 90 days required by his right to sue letter. This claim should be dismissed with prejudice because amendment would be futile.

2. Plaintiff fails to allege facts supporting his Title VII Claims for Discrimination Based on Race and Religion.

Even if this Court had jurisdiction, Plaintiff's First Claim for Relief should be dismissed because he has not alleged any facts that support a plausible inference of discrimination based on race, national origin, or religion.

42 U.S.C. § 2000e-2(a)(1) provides that it is an "unlawful employment practice" for an employer to "discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." To meet his burden on these claims, Plaintiff must allege facts to plausibly show that Defendant acted against him specifically *because of* his race or national origin and *because of* his religion. *See id*. Nothing Plaintiff alleges in the Amended Complaint creates a plausible inference that he suffered an adverse employment action because of his race or national origin or because of his religion.

With respect to Count One, Plaintiff vaguely alleges that he was "subjected to racist comments about his Native American heritage by coworkers, which comments were observed by and acquiesced in by defendant's managerial employees." Am. Compl. ¶ 10, ECF No. 135. Similarly, with respect to Count Two, Plaintiff alleges that (1) he is "of the Christian faith;" (2) "[r]idicule of Christianity was commonplace within defendant's workplace;" (3) he was "subjected to repeated questions and degrading comments relating to abortion, gay marriage, dancing, playing cards, and other imagined belief of Christians;" and (4) Defendant's executives were "either virulently antiChristian [sic] or dismissed Christians as dull witted bigots." (*Id.* ¶ 18.)

Plaintiff does not explain what statements were made, when they were made, who made the statements, or any facts as to how any such remarks related to the termination of his employment or otherwise adversely affected the terms and conditions of his employment. His

allegations and conclusory statements that his race/national origin and religion were "motivating factor[s]" in Defendant's decisions "relating to the terms and conditions" of his employment and in his termination cannot form the basis of a valid complaint under *Iqbal*. *See* 556 U.S. at 678 (holding that complaints that consists of mere conclusory allegations or merely recites statutory language or elements of claims are insufficient); *Naharaja v. Wray*, No. 3:13-CV-01261-HZ, 2015 WL 3986133, at *1 (D. Or. June 30, 2015) ("[T]he court need not accept conclusory allegations as truthful."), *motion for relief from judgment denied*, No. 3:13-CV-01261-HZ, 2015 WL 5970346 (D. Or. Oct. 12, 2015), *aff'd*, No. 15-35624 (9th Cir. June 10, 2016).

Plaintiff's allegations do not sufficiently allege that he was subject to a hostile work environment to state a claim. For harassment to be actionable under employment discrimination statutes, the conduct must be so "'severe or pervasive'" as to fundamentally alter the plaintiff's working conditions. *Manatt v. Bank of Am., NA*, 339 F.3d 792, 798 (9th Cir. 2003) (citation omitted). Title VII is not a "general civility code," and "'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (citation omitted); *Manatt*, 339 F.3d at 798. This Court finds that Plaintiff's allegations do not give rise to a plausible inference that Plaintiff was subjected to any severe or pervasive conduct. The First Claim for Relief (Counts One and Two) should be dismissed with prejudice its entirety.

B. Second Claim for Relief: Plaintiff Fails to Allege Sufficient Facts to Support a Claim for Age Discrimination under the ADEA or Oregon Revised Statute 659A.030.

Plaintiff's Second Claim asserts two counts of age discrimination—one based on an alleged violation of the ADEA, 29 U.S.C. § 623 (Count One), and one for an alleged violation of Oregon State law, ORS 659A.030 (Count Two). Plaintiff fails to state a claim on both counts.

To establish a disparate-treatment claim pursuant to the ADEA, a plaintiff "must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009). To make out a *prima facie* claim of discrimination under the ADEA, the plaintiff must demonstrate that "he was (1) at least forty years old, (2) performing his job satisfactorily, (3) discharged, and (4) either replaced by substantially younger employees with equal or inferior qualifications or discharged under circumstances otherwise 'giving rise to an inference of age discrimination.'" *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008) (quoting *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1281 (9th Cir. 2000)); *see also Barrett v. Kaiser Found. Health Plan of the Nw.*, No. 3:14-cv-02016-SI, 2015 WL 1491037, at *3 (D. Or. Apr. 1, 2015) (dismissing ADEA claim for failure to sufficiently state a claim).

Oregon's standard for establishing a *prima facie* case of age discrimination is identical to that under federal law, except that Oregon's age limit for claims is 18, rather than 40. *Henderson v. Jantzen, Inc.*, 79 Or. App. 654, 657, 719 P.2d 1322, 1324 (1986); *Dennis v. Airport Chevrolet, Inc.*, No. 1:13-cv-00008-CL, 2014 WL 715458, at *6 (D. Or. Feb. 24, 2014).

Plaintiff does not allege facts sufficient to state an age discrimination claim under either statute. First, Plaintiff does not allege that age was the "but for" cause of any adverse employment action taken against him, either as to the terms and conditions of his employment or his termination. Instead, he states only that the discrimination was "in substantial moving part due to" Plaintiff's age. Am. Compl. ¶ 23, ECF No. 135. This is insufficient under the applicable statutes. *See Gross*, 557 U.S. at 180; *Henderson*, 79 Or. App. 654; *Ogden v. Bureau of Labor*, 68 Or. App. 235, 243, 682 P.2d 802, 809 (1984), *aff'd in relevant part*, 299 Or. 98 (1985); *Rogers v. Or. Trail*

Elec. Consumers Coop., Inc., No. 3:10-CV-1337-AC, 2012 WL 1635127, at *11 (D. Or. May 8, 2012).

Second, the Amended Complaint is devoid of factual allegations that could support an age discrimination claim. The only age-related allegations in the Amended Complaint are that Plaintiff claims he was called "old man" and was "subjected to demands to see his driver[']s license," but Plaintiff makes no allegations as to when these comments were made, how often they were made, or who made them. Am. Compl. ¶ 22, ECF No. 135. These allegations fall short of the "severe and pervasive" conduct that could give rise to the level of unlawful harassment or discrimination. *See Faragher*, 524 U.S. at 788. Further, Plaintiff does not allege that he was performing his job satisfactorily or any other facts giving rise to a plausible inference that any adverse employment action was taken against him because of his age. Plaintiff's "unadorned, the-defendant-unlawfully-harmed-me accusation" is not sufficient to comply with the requirements of Rule 8. *Iqbal*, 556 U.S. at 678.

For these reasons, the Second Claim for Relief fails and should be dismissed with prejudice.

C. Third Claim for Relief: Plaintiff Fails to State a Claim for Disability Discrimination.

Plaintiff asserts two claims under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101, *et seq*. First, he claims that Defendant failed to provide reasonable accommodations in his employment in violation of 42 U.S.C. § 12112(b)(5)(A). Am. Compl. ¶¶ 28-35, ECF NO. 135. Second, he claims that Defendant unlawfully requested disability-related medical information in violation of 42 U.S.C. § 12112(d)(4)(A). *Id.* ¶¶ 39-44. Plaintiff also references Oregon state law as the basis for a third disability claim.[1] For the reasons below,

[1] The Amended Complaint lists Count Two of Claim Three as a claim under ORS 659A.118, but that section merely provides the statutory definition of "reasonable accommodation." The statute that provides a right of action for

Plaintiff has failed to state a claim for relief in all three instances, and his disability-discrimination claims should be dismissed with prejudice.

1. Count One: Plaintiff Fails to Allege Sufficient Facts to Support His Claim for Denial of Reasonable Accommodations.

The ADA prohibits certain employers from discriminating against employees on the basis of disability:

> No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a).

The statute prohibits the failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." *Id.* § 12112(b)(5)(A).

To state a claim under the ADA that an employer has failed to accommodate a disability, Plaintiff must allege that "(1) he is disabled within the meaning of the ADA; (2) he is a qualified individual able to perform the essential functions of the job with reasonable accommodation; and (3) he suffered an adverse employment action because of his disability." *Allen v. Pac. Bell*, 348 F.3d 1113, 1114 (9th Cir. 2003) (citing *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1246 (9th Cir. 1999)). Plaintiff's Amended Complaint fails to sufficiently allege any of these elements.

First, Plaintiff fails to allege facts supporting the contention that he is disabled. The ADA defines "disability" as "a physical or mental impairment that substantially limits one or more major

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failure to accommodate is ORS 659A.112. The Court assumes that Plaintiff intended to reference this statute. ORS 659A.118 does not provide a right of action.

life activities of such individual." 42 U.S.C. § 12102(1)(A). "[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12102(2)(A). Here, Plaintiff alleges that he "is a qualified individual with a disability" because "he suffered from one or more physical and mental impairments." Am. Compl. ¶ 29, ECF No. 135. However, Plaintiff never alleges what those impairments are. Likewise, although he recites the statutory language that his unspecified impairments "substantially limit and interfere with one or more major life activities," he does not explain how he is so limited.

It is not enough for Plaintiff to simply recite the elements of a claim using the words of a statute; he must allege how the facts of his case satisfy those elements. *Twombly*, 550 U.S. at 555. Because Plaintiff provides no facts whatsoever to support the allegation that he is (or was) disabled, his ADA claim should fail. *See Lacayo v. Donahoe*, No. 14-CV-04077-JSC, 2015 WL 993448, at *17 (N.D. Cal. Mar. 4, 2015) ("Plaintiff has not clearly identified the disability upon which her discrimination claim is based, which renders the claim insufficiently pled." (citing *McKenna v. Permanente Med. Grp., Inc.*, 894 F. Supp. 2d 1258, 1278 (E.D. Cal. 2012))).

Second, Plaintiff fails to allege facts in support of his contention that he is a "qualified individual" under the statute. Even among the disabled, the ADA only offers a remedy for plaintiffs who are "able to perform the essential functions of the job with reasonable accommodation." *Allen*, 348 F.3d at 1114; 42 U.S.C. § 12111(8). Again, Plaintiff recites the appropriate statutory language but provides no supporting facts. Other than alleging that he was a "Data Warehouse Administrator," Plaintiff does not allege what the essential functions of his job were, when he became disabled, or how his disability impacted his ability to perform his job. Am. Compl. ¶ 9,

ECF No. 135. In fact, Plaintiff alleges that "[h]e is able to perform the essential functions of his position with reasonable accommodation *or without such accommodation." Id.* at ¶ 30 (emphasis added). Plaintiff's conclusory allegations, and allegations contravening that he is a "qualified individual," are insufficient to state a claim for relief. *See, e.g., King v. C&K Mkt., Inc.*, No. 2:16-CV-00559-TLN-CMK, 2018 WL 934551, at *4 (E.D. Cal. Feb. 15, 2018) (dismissing ADA claim where plaintiff failed to "allege facts sufficient to demonstrate her ability to perform the essential functions of her job with or without a reasonable accommodation, or even what the essential functions of her job are"); *Ting v. Adams & Assocs., Inc.*, No. 2:16-CV-01309-TLN-KJN, 2017 WL 4422508, at *6 (E.D. Cal. Oct. 5, 2017) (dismissing ADA claim in part because "Plaintiff does not allege facts showing how she was limited by her condition or able to perform the essential job functions").

Third, Plaintiff does not allege sufficient facts to support that he suffered an adverse employment action because of his purported disability. Plaintiff generally alleges that he "requested reasonable accommodation due to his disability on several occasions," that "defendant failed and refused to provide such accommodations," and that "[d]efendant failed and refused to engage in a good faith interactive process with plaintiff to identify feasible and appropriate accommodations." Am. Compl. ¶¶ 31-32, ECF No. 135. Though he generally lists some accommodations he claims to have requested, he alleges no facts supporting the process by which he requested accommodations or how Defendant responded. He fails to allege when, how, and to whom the requests were made, and he does not state whether Defendant responded at all and, if it did, why his requests were allegedly rejected. *See Wozab v. Flextronics Am., LLC*, No. 2:11-CV-1612-LDG-GWF, 2012 WL 4498232, at *4 (D. Nev. Sept. 28, 2012) (dismissing ADA claim for failure to allege "how the requested accommodations may have been reasonable, to whom the

purported requests were made, and why the accommodations were necessary for plaintiff to perform his job"). He also does not specify when he became disabled or when he informed Defendant of his disability, instead simply stating that he was disabled "at relevant times." *Id.* at *3 ("[T]he phrase '[a]t all relevant times' is factually too indefinite to indicate when defendant was advised of plaintiff's disability."). Without these basic supporting facts, Plaintiff fails to state a claim under the ADA.[2] By admitting he was able to perform his job without accommodation, Plaintiff can not prove he was a qualified individual under the ADA. This claim should be dismissed with prejudice because amendment would be futile.

2. Count Two: Plaintiff fails to state a claim for "Improper Medical Inquiry."

Plaintiff's second count under the ADA alleges a violation of 42 U.S.C. § 12112(d)(4)(A), which provides as follows:

> A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.[3]

Plaintiff alleges that Defendant violated this section by demanding that he provide medical records and updates on his condition after he requested time off due to his "symptoms." Am. Compl. ¶¶ 41-42, ECF No. 135. Plaintiff's claim fails, however, because he admits that he had requested time off as a reasonable accommodation of his disability, and Defendant had the right

[2] Plaintiff's ADA claim is also time-barred to the extent it is based on any alleged acts that occurred before March 19, 2013. A plaintiff must file a timely charge of discrimination with the EEOC as a prerequisite to bringing an ADA claim. 42 U.S.C. § 12117(a). Further, 42 U.S.C. § 2000e-5(e)(1) requires a complainant to file a charge with the EEOC within 180 days "after the alleged unlawful employment practice occurred," unless the complainant initially institutes proceedings with a state or local agency, in which case the EEOC charge must be filed within 300 days. *See also Clink v. Or. Health & Sci. Univ.*, 9 F. Supp. 3d 1162, 1164-65 (D. Or. 2014). Plaintiff filed a complaint with BOLI on January 13, 2014. (*See* Dkt. 1-3 at 24.) Therefore, any acts occurring before March 19, 2013 are nonactionable.

[3] Plaintiff alleges a violation of ORS 659A.136, which incorporates the same language as 42 U.S.C. § 12112(d)(4)(A) and is interpreted consistently with that statute. *See* ORS 659A.139; *Heiple v. Henderson*, 229 Or. App. 693, 700, 215 P.3d 891 (2009). Plaintiff's state-law claim therefore rises and falls with his ADA claim.

to request verification of and updates to an alleged disability that was impacting his ability to perform his job.

Plaintiff does not alleges the nature of his purported disability, but does allege that he "requested reasonable accommodation due to his disabilities on several occasions, including . . . to telecommute, and time off work . . . ." *Id.* ¶ 31. He alleges that, in response to the request for time off, his supervisors "demanded access to [his] medical records," "demanded that [he] add updates on his medical conditions to his weekly status reports and periodically stopped by [his] cubical [to] demand a verbal accounting of his treatment and medical condition." *Id.* ¶¶ 41-42.

The EEOC—the agency tasked with implementing the ADA—has unequivocally stated that inquiries into the health of employees are "job-related and consistent with business necessity" under the ADA when the employer has reason to believe that a health condition could affect job performance:

> Generally, a disability-related inquiry or medical examination of an employee may be "job-related and consistent with business necessity" when an employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition.

Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), 2000 WL 33407181, at *6 (2000) (footnotes omitted) (hereinafter, "EEOC Enforcement Guidance"); *see also Doby v. Sisters of St. Mary of Or. Ministries Corp.*, No. 3:13-CV-0977-ST, 2014 WL 3943713, at *7 (D. Or. Aug. 11, 2014).

By his own admission, Plaintiff had already informed his supervisors and coworkers that his medical condition was impacting his ability to perform his job duties. Am. Compl. ¶¶ 29, 40-41, ECF No. 135. In that circumstance, Defendant is entitled to request additional information about the nature and severity of his condition because those requests are job-related and consistent with business necessity.

Defendant's alleged requests for medical information from Plaintiff also would be justified by his prior request for reasonable accommodations for his disability: "Disability-related inquiries and medical examinations that follow up on a request for reasonable accommodation when the disability or need for accommodation is not known or obvious also may be job-related and consistent with business necessity." EEOC Enforcement Guidance, 2000 WL 33407181, at *6.

> The employer is entitled to know that an employee has a covered disability that requires a reasonable accommodation. Thus, when the disability or the need for the accommodation is not known or obvious, it is job-related and consistent with business necessity for an employer to ask an employee for reasonable documentation about his/her disability and its functional limitations that require reasonable accommodation.

Id. at *9 (footnote and emphasis omitted).

Here, Plaintiff admits that Defendant's alleged requests for information were in direct response to his request for time off as a reasonable accommodation of his disability. Am. Compl. ¶¶ 31, 41, ECF No. 135. Defendant would have been well within its rights to request further information about Plaintiff's alleged disability.

Because any requests for medical information from Plaintiff would have been "job-related and consistent with business necessity," Count Two of Plaintiff's Third Claim for Relief should be dismissed with prejudice.

3. Count Three: Plaintiff Fails to State a Claim Under Oregon Revised Statute 659A.112.

Plaintiff also asserts a state-law disability discrimination claim under Oregon Revised Statute 659A.112. Am. Compl. ¶¶ 36-38, ECF No. 135. This claim fails for the same reasons as his ADA claims because "[t]he standard for establishing a prima facie case of discrimination under Oregon law is identical to that used in federal law." *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1087 (9th Cir. 2001) (citing *Henderson*, 79 Or. App. at 656); *see also* ORS 659A.139(1)

("ORS 659A.103 to 659A.144 shall be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Americans with Disabilities Act of 1990, as amended by the federal ADA Amendments Act of 2008 and as otherwise amended." (footnote omitted)). Because this Court recommends that Plaintiff's ADA claims be dismissed for failure to state a claim, it recommends that this Oregon state claim also be dismissed on the same grounds. It should be dismissed with prejudice because amendment would be futile.

D. Fourth Claim for Relief: Plaintiff Fails to State a Claim for Denial of Medical Leave.

Plaintiff alleges two claims of denial of medical leave, the first under the federal Family and Medical Leave Act, 29 U.S.C. § 2601 (Count One), and the second under the Oregon Family Leave Act, Or. Rev. Stat. 659A.183. Am. Compl ⁋⁋ 45-57. For the following reasons, both of Plaintiff's claims should be dismissed with prejudice.

1. Count 1: Plaintiff Fails to State a Claim Under the Family and Medical Leave Act.

The Family and Medical Leave Act ("FMLA") provides that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). The statute prohibits (1) interference with an employee's exercise of his or her rights and (2) discrimination against an employee due to his or her pursuit of any charge or proceeding under the statute. 29 U.S.C. § 2615. Courts have referred to claims under these separate prohibitions as "interference" and "retaliation" claims, respectively. Count One of Plaintiff's Fourth Claim for Relief purports to allege an interference claim but, as discussed below, fails to allege sufficient facts in support.[4]

[4] A retaliation claim results when "an employee is punished for *opposing* unlawful practices by the employer." *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1136 (9th Cir. 2003). Plaintiff has not alleged an FMLA retaliation claim. His FMLA allegations relate to his efforts to exercise his rights, not to any efforts to oppose purportedly wrongful behavior

FMLA provides that it is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise" the substantive rights guaranteed by the statute. *Id.* § 2615(a)(1). "When a party alleges a violation of § 2615(a)(1), it is known as an 'interference' or 'entitlement' claim." *Sanders v. City of Newport*, 657 F.3d 772, 777-78 (9th Cir. 2011) (quoting *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1124 (9th Cir. 2001)). To sufficiently plead an FMLA interference claim, a plaintiff must allege that:

> "(1) he was eligible for the FMLA's protections, (2) his employer was covered by the FMLA, (3) he was entitled to leave under the FMLA, (4) he provided sufficient notice of his intent to take leave, and (5) his employer denied him FMLA benefits to which he was entitled."

Id. at 778 (quoting *Burnett v. LFW Inc.*, 472 F.3d 471, 477 (7th Cir. 2006)). Plaintiff's Amended Complaint fails to sufficiently plead these elements.

First, Plaintiff fails to allege that he was entitled to FMLA leave. The statute provides that an eligible employee is entitled to leave if he or she has "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). Plaintiff alleges that "[a]s a result of [his] injuries, both on-the-job and off work, plaintiff required time off work to undergo surgery." Am. Compl. ¶ 46, ECF No. 135. Plaintiff does not allege what these "injuries" are, how they constitute a "serious health condition," or what surgery was purportedly required. Without supporting facts, this allegation is merely a recitation of one element of an FMLA claim and is insufficient to state a claim for relief.

Plaintiff also does not allege that his health condition rendered him "unable to perform the functions of [his] position." 29 U.S.C. § 2612(a)(1)(D). To the contrary, he explicitly alleges that, "[a]t all relevant times, plaintiff was . . . able to perform the essential functions of his position . . .

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by Defendant with respect to FMLA leave. *See Traxler v. Multnomah County*, No. 06-1450-KI, 2008 WL 282272, at *17 (D. Or. Jan. 29, 2008) (plaintiff failed to state FMLA retaliation claim when there was no evidence that she opposed employer's denial of leave).

without [reasonable] accommodation." Am. Compl. ¶ 30, ECF No. 135. Because Plaintiff was able to perform the functions of his job, he was not entitled to leave under FMLA. *See Lynch v. Klamath Cty. Sch. Dist.*, No. 1:13 CV 02028-CL, 2015 WL 2239226, at *6 (D. Or. May 12, 2015) (leave was not "medically necessary" where plaintiff was not "unable to perform her professional duties").

Second, Plaintiff does not sufficiently allege that he provided notice of medical leave under FMLA, making only the conclusory allegation that he "requested protected leave for the purpose of treatment for a serious health condition." Am. Compl. ¶ 49, ECF No. 135. Plaintiff, however, does not allege to whom he provided notice, what form that notice took, or what dates he proposed to take off. *See Jacobs v. York Union Rescue Mission, Inc.*, No. 1:12-CV-0288, 2013 WL 433327, at *4 (M.D. Pa. Feb. 5, 2013) ("[Plaintiff]'s complaint is deficient without specific factual allegations setting forth how she provided [Defendant] with adequate notice of her intention to take FMLA leave."). Without any facts about the notice purportedly provided to Defendant, Plaintiff fails to establish this necessary element of a FMLA claim.

Plaintiff admits he was able to perform his job and provides no facts supporting either his eligibility for FMLA leave or his notice to Defendant of his intent to take leave. Thus, Plaintiff fails to properly allege a FMLA claim and the Court recommends that this claim be dismissed with prejudice because amendment would be futile.

2. Count Two: Plaintiff Fails to State a Claim Under OFLA.

Count Two of Plaintiff's Fourth Claim alleges a claim for medical leave violation under the Oregon Family Leave Act ("OFLA"), Oregon Revised Statute 659A.183. Am. Compl., ¶¶ 53-57, ECF No. 135. Plaintiff again provides no factual allegations but instead merely recites the elements of the claim. *Id.* OFLA is subject to the same standards and requirements as FMLA. *See* Or. Rev. Stat. 659A.186(2) ("ORS 659A.150 to 659A.186 shall be construed to the extent possible

in a manner that is consistent with any similar provisions of the federal Family and Medical Leave Act of 1993."). As such, Plaintiff's OFLA claim fails for the same reasons as his FMLA claim and should be dismissed with prejudice because amendment would be futile given Plaintiff's admission that he was able to perform the essential functions of his job without accommodation at the relevant times.

E. Fifth, Sixth, Ninth, Tenth, and Twelfth Claims for Relief: Plaintiff's Whistleblower Retaliation Claims Should Each Be Dismissed.

Plaintiff's Amended Complaint attempts to allege at least ten different whistleblower protection provisions that Plaintiff claims Defendant violated. Plaintiff alleges that Defendant retaliated against him for reporting or complaining about Defendant's purported engagement in multiple types of allegedly unlawful conduct, including (1) discrimination based on race, national origin, religion, and age; (2) "accounting fraud and violations of securities statutes and regulations," including SOX and various provisions of Dodd-Frank, (Am. Compl. ¶ 59, ECF No. 135); (3) Medicare and Medicaid claims fraud, (*id*. ¶ 88); (4) "unlawful obtaining and use of laboratory test results," (*id*.); (5) violations of various health care laws, including HIPAA, (*see, e.g., id*. ¶ 100); and (6) "private insurance fraud," (*id*. ¶ 140).

First, each whistleblower claim fails because Plaintiff has not alleged facts that give rise to a plausible inference that Defendant took any adverse employment action against Plaintiff because of the alleged whistleblowing. Plaintiff does not allege any facts that plausibly suggest that Defendant knew about any reports Plaintiff claims to have made to state or federal agencies at any time before his employment was terminated. Plaintiff's sole basis for the claim that Defendant knew of any such reports is his allegation that he "suspects" that Defendant "used a keystroke

logger or private investigator to discover his login name and password," hacked into his computer, and learned about his alleged whistleblowing activity. *Id*. ¶ 88.[5]

In ruling on this motion, the Court need not check its common sense at the door. Rather, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the . . . court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679; *see also Lancaster v. City of Pleasanton*, No. C 12-05267, 2013 WL 5182949, at *5 (N.D. Cal. Sept. 13, 2013) (finding that plaintiff failed to state a claim sufficient to permit an amended pleading where the inferences plaintiff was suggesting were "too far-fetched"). Plaintiff's suspicion that Defendant hacked into his email is conjecture, and Plaintiff does not alleged facts supporting a reasonable inference that any such "intrusions" occurred. Given their conclusive nature, Plaintiff's allegations are not entitled to the assumption of truth, and they do not give rise to a plausible inference that any whistleblower protection provision was violated in this case. *See Iqbal*, 556 U.S. at 679 ("[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.").

Nor do the other allegations in the Amended Complaint about complaints Plaintiff asserts he made during the course of his employment support any whistleblower retaliation claims. Plaintiff alleges, for the first time, that he reported what he believed were violations of law to Defendant's "Chief Medical Officer," who "[a]pparently kept those concerns secret from other senior executives," but those executives learned about the reports in 2014—the year after Plaintiff

[5] Paragraph 88 is not alleged or incorporated by reference into many of Plaintiff's retaliation claims, such as those alleged in the Sixth Claim. Those claims (such as Counts Five and Six) are unsupported by any facts suggesting that Defendant could have had knowledge about Plaintiff's alleged whistleblowing activity when it terminated his employment. But even if the Court considers allegations in the Amended Complaint that are not expressly incorporated into a particular claim or count, none of those allegations is sufficient to state a claim under the applicable pleading standards for the reasons discussed herein.

was fired.[6] However, Plaintiff then alleges, without supporting facts, that he was fired in 2013 when Defendant found out about his reports to the Chief Medical Officer. *See* Am. Compl. ¶ 99, ECF No. 135. Plaintiff fails to plausibly allege facts giving rise to retaliation claims by alleging that he was fired one year prior to Defendant finding out about Plaintiff's reporting actions, which actions Plaintiff claims are the source of his retaliatory termination.

Plaintiff also alleges that on October 3, 2012—about one year before his termination—he complained about creating "Hot Spotter" reports that Plaintiff characterizes as "medical redlining." *Id.* at ⁋ 119, *See also id.* ¶ 114. First, Plaintiff does not allege what law Plaintiff believes Defendant violated when it purportedly created the "Hot Spotter" reports. And, the Court finds that the one-year time-lag between Plaintiff's alleged complaint and his termination does not, on its own plausibly allege that his termination was retaliatory. *See Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001) (timing alone was insufficient to support a claim of retaliation when almost two years had passed between the protected activity and the adverse employment action); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) ("causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity," but 18 months was too long to infer causation).

For these reasons, each retaliation claim (Fifth, Sixth, Ninth, Tenth, and Twelfth Claims for Relief) fails and should be dismissed. Each claim fails for additional reasons, as further explained below.

[6] Plaintiff attaches two "Exhibits" to the Amended Complaint but does not reference them anywhere in the amended pleading. Even if the exhibits are considered, neither contains any information that suggests that Plaintiff complained to *Defendant* about any alleged unlawful activity. Rather, the exhibits confirm that the sole basis for Plaintiff's contention that Defendant was aware of any alleged whistleblowing is because he suspects that Defendant "hacked" into his private email account after he was placed on Administrative Leave.

1. Fifth and Sixth Claims for Relief: Plaintiff Has Not Stated, and as a Matter of Law Cannot State, a Claim for Retaliation Under 18 U.S.C. § 1514A.

Plaintiff's Fifth Claim, and what the Court construes as Count One of Plaintiff's Sixth Claim, appear to state the same claim—a violation of the whistleblower protection provision of SOX, 18 U.S.C. § 1514A. Both claims should be dismissed for numerous reasons.

Section 1514A provides, in relevant part:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)) . . . discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders . . . .

18 U.S.C. § 1514A(a)(1).

First, Plaintiff has not alleged any facts suggesting that Defendant is a "company with a class of securities registered under section 12" of the Securities Exchange Act of 1934 or that it is required to file a report under section 15(d) of that Act. Plaintiff instead acknowledges that, during the entire time of his employment, Plaintiff was a "private company." *See* Am. Compl. ¶ 63, ECF No. 135. For that reason alone, Plaintiff cannot assert a claim under Section 1514A and the Fifth and Sixth Claims for Relief should be dismissed.

Plaintiff also asserts that Defendant was "conducting business as a state contractor and subject to Sarbanes Oxley under Lawson v. FMR, LLC." *Id*. ¶ 64. The Court construes this as a legal conclusion based on Plaintiff's reading of the U.S. Supreme Court's decision *Lawson v. FMR LLC*, 571 U.S. 429 (2014). The Court need not accept legal conclusions as true, but in any event, as Defendant argues, Plaintiff misconstrues *Lawson*. Mot. Dismiss 24, ECF No. 37.

In *Lawson*, the Court held that employees of privately held contractors and subcontractors who perform work for a public company are protected under Section 1514A. *Lawson*, 571 U.S. at 433, 459. But the state is not a public company. Because Plaintiff is not an employee of a contractor working for a public company subject to SOX, Plaintiff can not avail himself of Section 1514A protections. Defendant's alleged status as a "state contractor" does not save this claim.

Plaintiff has not alleged facts supporting that Defendant is covered by SOX, but even if he had, Plaintiff cannot maintain a whistleblower retaliation claim under SOX because he has failed to allege that he has exhausted his administrative remedies. 18 U.S.C. § 1514A(b)(1) provides that:

> [a] person who alleges discharge or other discrimination by any person in violation of [§ 1514A(a)] may seek relief . . . by—(A) filing a complaint with the Secretary of Labor; or (B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

Similarly, the DOL's implementing regulations specify that an "employee who believes that he or she has been retaliated against by a covered person in violation of [SOX] may file . . . a complaint alleging such retaliation," and that such complaint should be filed with a DOL Occupational Safety and Health Administration ("OSHA") office. 29 C.F.R. § 1980.103(a), (c). A complainant thereafter may seek a hearing before an Administrative Law Judge ("ALJ"); then review of the ALJ's decision with the DOL's Administrative Review Board ("ARB"); and then judicial review of the ARB's final order in the U.S. Court of Appeals for the appropriate circuit. *See id*. §§ 1980.106, 1980.110, 1980.112(a). A complainant may bring an action for de novo review in the district court "[i]f the Secretary has not issued a final decision within 180 days of the filing of the complaint, and there is no showing that there has been delay due to the bad faith of the complainant." *Id*. § 1980.114(a).

Accordingly, Plaintiff was required to exhaust his administrative remedies before bringing a judicial action for alleged violations of section 1514A. *See, e.g., Wallace v. Tesoro Corp.*, 796 F.3d 468, 477 (5th Cir. 2015) (affirming dismissal of plaintiff's section 1514A(a) claim where plaintiff failed to allege that he satisfied SOX's exhaustion requirement). Although Plaintiff's Amended Complaint now contains allegations about telephone calls he purportedly made to a number of different state and federal agencies, or complaints he thought he was making to various agencies, none of his allegations establishes that he followed the filing procedures required to assert a whistleblower retaliation claim under section 1514A and its implementing regulations.

Plaintiff did not comply with those requirements. Plaintiff filed a complaint with the DOL asserting violations of section 1514A (and 29 U.S.C. § 218c) on April 4, 2016, 920 days after the termination of his employment, or 740 days after the expiration of his 180-day filing window. The ALJ summarily dismissed Plaintiff's complaint because it was untimely, and Plaintiff has sought review of that order with the ARB, which remains pending. Req. Judicial Notice Ex. C, ECF No. 138. Having failed to exhaust his administrative remedies, Plaintiff cannot maintain a claim in this action. This Court recommends dismissal of Plaintiff's Fifth Claim for Relief and the Sixth Claim for Relief, Count One. Both should be dismissed with prejudice because amendment would be futile.

2. Sixth Claim for Relief, Count Two: Plaintiff Has Not Stated a Claim for Retaliation in Violation of Title VII.

As noted above, Title VII prohibits discrimination in employment on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1); *see also Martinez v. Mary's Woods at Marylhurst, Inc.*, No. 05-437-HA, 2006 WL 1360946, at *1 (D. Or. May 16, 2006). The anti-retaliation provision of Title VII provides, in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful

> employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). An employer violates this provision if the adverse employment action occurs: (1) because an employee opposed what he or she reasonably perceived as discrimination under Title VII; or (2) in retaliation for the employer's participation in an investigation, proceeding, or hearing involving charges of discrimination under Title VII. *See Learned v. City of Bellevue*, 860 F.2d 928, 932 (9th Cir. 1988); *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Cir. 1997).

Count Two of the Sixth Claim for Relief alleges that "Plaintiff resisted and opposed violations of Title VII as alleged herein above," and that, in response, Defendant retaliated against him "in the terms and conditions of employment and in his termination" in violation of Title VII, 42 U.S.C. § 2000e-3(a). The only violations of Title VII Plaintiff alleges in the Amended Complaint relate to the so-called discrimination based on race, national origin, or religion. But as noted above, Plaintiff did not identify those bases of discrimination in his charge filed with the EEOC, and nothing in the Amended Complaint suggests that the EEOC considered or investigated any complaints that Defendant retaliated against Plaintiff because he resisted or opposed any conduct relating to his "Native American heritage" or Christian faith. For the same reasons discussed above, Plaintiff's Title VII retaliation claim fails because he did not timely file such a charge with the EEOC.

Additionally, Plaintiff does not allege any facts to support his claim. He vaguely asserts that he "resisted and opposed" the alleged Title VII violations, but he does not describe any of the circumstances relating to such resistance or opposition, nor any facts that plausibly suggest that Defendant's termination of him was based at all on such opposition. Plaintiff's "[t]hreadbare

recitals of the elements of a cause of action, supported by mere conclusory statements," are insufficient to withstand a motion to dismiss. *See Iqbal*, 556 U.S. at 678; *Hydrick v. Hunter*, 669 F.3d 937, 941 (9th Cir. 2012) (plaintiffs' "bald" and "conclusory" allegations were insufficient to establish plausible claims against defendants); *Hartmann v. Cal. Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1121-22 (9th Cir. 2013). Count Two should be dismissed with prejudice because amendment would be futile.

3. Sixth Claim for Relief, Count Three: Plaintiff Has Not Stated a Claim for Retaliation Under the ADEA.

Count Three of the Sixth Claim alleges that Defendant retaliated against Plaintiff in violation of the ADEA, 29 U.S.C. § 623(d), because he "resisted and opposed defendant's violations of the ADEA, the Civil Rights Act, unlawful medical redlining [sic]." Am. Compl. ¶¶ 72, 73, ECF No. 135.

29 U.S.C. § 623(d) makes it unlawful for an employer to discriminate against an employee "because such individual . . . has opposed any practice made unlawful by this section." To establish a claim for retaliation under the ADEA, Plaintiff must prove that: (1) he engaged in conduct protected under the ADEA; (2) he suffered an adverse employment decision; and (3) there was a causal link between his activity and the adverse employment decision. *See Rucker v. Vilsack*, No. 08-6150-HO, 2010 WL 1541670, at *3 (D. Or. Apr. 16, 2010) (citing *Poland v. Chertoff*, 494 F.3d 1174, 1179-80 (9th Cir. 2007)).

Here, the activity in which Plaintiff contends he engaged is not protected under the ADEA, which pertains to discrimination in the employment context. *See* 29 U.S.C. § 621(b). Plaintiff's ADEA retaliation claim does not allege that he complained about or resisted any age discrimination against any Defendant employees. Rather, Plaintiff alleges that Defendant created "Hot Spotter" reports that included age "as a determining factor in granting referrals, treatment,

and medication," and that "Plaintiff protested this use of age, race, and medical treatment cost." Am. Compl. ¶ 71, ECF No. 135. In other words, Plaintiff complains that he objected to Defendant's alleged inclusion of age in reports used to make health care decisions for persons under health care plans offered by Defendant. Such allegations cannot form the basis of a retaliation claim under the ADEA. *See EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1013 (9th Cir. 1983) ("The employee's statement cannot be 'opposed to an unlawful employment practice' unless it refers to some practice by the employer that is allegedly unlawful. . . . [O]pposition clause protection will be accorded whenever the opposition is based on a 'reasonable belief' that the employer has engaged in an unlawful *employment* practice" (emphasis omitted and added)); *Yap v. Slater*, 165 F. Supp. 2d 1118, 1127 n.6 (D. Haw. 2001) ("In order to be a 'protected activity' under § 623(d), an employee's actions must oppose an *employment practice* of the employer." (emphasis added)). Moreover, Plaintiff does not allege facts suggesting a causal link between his opposition to alleged age-related discrimination and any adverse employment action taken by Defendant. Plaintiff's ADEA claim should be dismissed with prejudice because amendment would be futile.

4. Sixth Claim for Relief, Count Four: Plaintiff's Claim Under Oregon Revised Statute 659A.030(1)(f) Fails.

In addition to citing federal statutes, Plaintiff also alleges in that Defendant violated Oregon Revised Statute 659A.030(1)(f) by retaliating against him for opposing the alleged discrimination based on age, religion, and race/national origin. Oregon Revised Statute 659A.030(1)(f) makes it an unlawful employment practice for "any person to discharge, expel or otherwise discriminate against any other person because that other person has opposed any unlawful practice, or because that other person has filed a complaint, testified or assisted in any proceeding under this chapter or has attempted to do so."

As with discrimination claims, the substantive analysis for retaliation claims in violation of Oregon Revised Statute 659A.030(1)(f) and 42 U.S.C. § 2000e-3 under Title VII is substantially similar. *See Warzecha v. Kemper Sports Mgmt., Inc.*, No. 6:11-CV-06221-SI, 2012 WL 2396888, at *7 (D. Or. June 25, 2012) ("Retaliation claims brought under ORS 659A.030 and those brought under Title VII are analyzed in the same manner . . . .").

Plaintiff has not asserted a claim in this action for an alleged violation of Oregon Revised Statute 659A.030(1)(f) until now. Oregon law gives a plaintiff one year to file a lawsuit or complaint with BOLI for alleged unlawful employment discrimination. Or. Rev. Stat. 659A.875(1). In paragraph "A" of the "Procedural Requirements" section of his Amended Complaint, Plaintiff vaguely alleges that he filed administrative complaints with BOLI and the EEOC and identified Oregon Revised Statute 659A.030(1)(f) as a statute cited in those complaints. He attaches the EEOC Notice of Charge of Discrimination but not the BOLI complaints to the motion.

Plaintiff filed his first verified written complaint with BOLI on or about January 13, 2014 (BOLI Case # DPEMDP140113-50046) (the "First BOLI Complaint"), in which he identified Oregon Revised Statute 659A.030(1)(f) as a statute on which his complaint was based. Req. Judicial Notice Ex. D, ECF No. 138. Although he cited the statute, the verified statement that accompanied the complaint does not contain any allegations that identifies any alleged discrimination based on race, national origin or religion (or retaliation for opposition to any such discrimination) as circumstances giving rise to such discrimination or retaliation.[7] *Id.* Plaintiff also did not identify religion, race, or national origin as circumstances giving rise to any alleged

[7] BOLI closed its case with respect to the First BOLI Complaint on December 10, 2014 "because the complaint has been resolved by a Federal court or agency." *See* Req. Judicial Notice Ex. G, ECF No. 138. This letter is dated a few weeks after Plaintiff voluntarily dismissed the 2014 employment case. *See* Req. Judicial Notice Ex. A, ECF No. 138.

discrimination in the EEOC Notice of Charge of Discrimination, dated January 23, 2014 (and that complaint also does not reference ORS 659A.030). *See* Am. Compl., Ex. 2, ECF No. 135; *see also* discussion *supra* Section II.A.1.

Plaintiff then filed a second verified written BOLI complaint on August 25, 2014 (BOLI Case # STEMWB140825-51197) (the "Second BOLI Complaint"), which also does not reference Oregon Revised Statute 659A.030 or include any allegations of purported discrimination based on race, religion or national origin or retaliation for opposition to such alleged discrimination. *See* Req. Judicial Notice Ex. E, ECF No. 138. Because Plaintiff did not identify race, religion or national origin discrimination as being at issue in any BOLI or EEOC complaint filed within one year of the termination of his employment or any other alleged adverse employment action by Defendant, and because this claim was not filed in this lawsuit until now—more than 4 years after his termination—Plaintiff is precluded from bringing any action pursuant to Oregon Revised Statute 659A.030 based on alleged retaliation for opposition to any such purported discrimination.

Even if not time-barred, Count Four also fails because Plaintiff has not alleged sufficient facts to state a claim. Plaintiff vaguely alleges that he "resisted and opposed" discrimination "based on age, religion, and race/national origin," but the Amended Complaint contains no factual allegations regarding the circumstances of such opposition that could give rise to a plausible inference that retaliation occurred. Plaintiff has not alleged facts regarding to whom he complained, what specific practices he opposed, whether those practices were employment-related, or any facts suggesting that any adverse employment action was taken against him because of such opposition. Plaintiff's allegations are insufficient to satisfy the applicable pleading standards. *See Iqbal*, 556 U.S. at 678; *Hydrick*, 669 F.3d at 941. Count Four should be dismissed with prejudice for failure to state a claim because amendment would be futile.

5. Sixth Claim for Relief, Counts Five and Six: Plaintiff Alleges No Facts That Plausibly Give Rise to a Reasonable Inference of Retaliation in Violation of Oregon Revised Statutes 659A.199 or 659A.230.

Also for the first time in this action, Plaintiff alleges that Defendant violated Oregon Revised Statutes 659A.199 and 659A.230 by discriminating against him "in the terms and conditions of employment and in his termination" because Plaintiff "complained of and opposed what he reasonably believed were violations of law, regulation, or rule—including violations of HIPAA regulations, violations of 42 U.S. Code § 1395dd, and ORS 192.537, among others." Am. Compl. ¶¶ 78, 79, ECF No. 135.[8]

Oregon Revised Statute 659A.199 prohibits an employer from retaliating against an employee who reports potentially unlawful activity, and Oregon Revised Statute 659A.230 prohibits retaliation against an employee who "in good faith reported criminal activity." Again, Plaintiff was required to file a lawsuit or complaint with BOLI alleging such claims within one year of the adverse employment action. *See* Or. Rev. Stat. 659A.875(1). Neither the First BOLI Complaint nor the EEOC Complaint references Oregon Revised Statute 659A.199 or 659A.230. *See* Req. Judicial Notice Ex. D, ECF No. 138; Am. Compl. Ex. A, ECF No. 135. The Second BOLI Complaint cites Oregon Revised Statute 659A.199, but not Oregon Revised Statute 659A.230. *See* Req. Judicial Notice Ex. E, ECF No. 138. Thus, Plaintiff is barred from bringing any claim pursuant to Oregon Revised Statute 659A.230 because he neither filed a claim based on that statute with BOLI or with this Court within one year of the alleged unlawful employment practice.

Plaintiff is also barred from bringing a claim based on Oregon Revised Statute 659A.199. BOLI issued its notice of Plaintiff's right to bring a civil suit on December 1, 2014. *See* Req.

[8] Plaintiff has included no allegations indicating why he believes 42 U.S.C. § 1395dd (relating to treatment of emergency medical conditions) or Oregon Revised Statute 192.537 (relating to individual rights in genetic information) were violated. Thus there are no facts to support whether his belief that these statutes were violated is a reasonable belief.

Judicial Notice Ex. F, ECF No. 138. Thus, Plaintiff was required to file a civil lawsuit on or before March 2, 2015. This lawsuit was not filed until June 4, 2015, and his Oregon Revised Statute 659A.199 claim was not asserted until now. Plaintiff did not timely file a claim for an alleged violation of Oregon Revised Statute 659A.199, and it should be dismissed with prejudice.

Even if not time-barred, Plaintiff's claims are insufficiently pled. As with his other discrimination and retaliation claims, Plaintiff must allege facts that give rise to a plausible inference that Plaintiff engaged in protected activity and that there is a causal link between that protected activity and an adverse employment action. To establish causation, Plaintiff must show that his protected activity was a "substantial factor in the motivation to discharge the employee." *Huitt v. Optum Health Servs.*, 216 F. Supp. 3d 1179, 1190 (D. Or. 2016) (citation omitted).

As explained above, Plaintiff has not alleged facts that suggest that Defendant was aware of or had any knowledge of Plaintiff's alleged reports of suspected unlawful activity, nor has he alleged sufficient facts that his reporting was a "substantial factor" in the termination of his employment or any other adverse employment action. *See Breeden*, 532 U.S. at 273 (no causation where there was no indication that the employee's supervisor knew about the alleged protected activity at the time of the adverse employment action); *see also* discussion *supra* Section II.E. Moreover, with respect to Oregon Revised Statute 659A.230, Plaintiff lists a number state and federal agencies with whom he said he "cooperated" and whom he "contacted," but there are no factual allegations about what that purported cooperation or contact entailed, what criminal activity he claims to have reported, when such contacts were made, or whether Defendant was aware of it at the time his employment was terminated. Instead, Plaintiff merely recites the elements of the cause of action, which is insufficient to state a claim under *Iqbal*. This claim should be dismissed with prejudice because amendment would be futile.

6. Ninth Claim for Relief: Plaintiff Cannot State a Claim for Whistleblowing Under 5 U.S.C. § 552a.

For the first time in this case, Plaintiff has alleged "Whistleblowing Retaliation" in violation of the "Privacy Act," 5 U.S.C. § 552a. Am. Compl. ¶¶ 91-104, ECF No. 135. It is unclear how any of the allegations contained within the Ninth Claim for Relief relate to the Privacy Act, but in any event, the statute does not apply to Defendant.

"The Privacy Act was enacted to protect the privacy of individuals identified in government information systems by regulating the collection, maintenance, use, and dissemination of personal information and prohibiting unnecessary and excessive exchange of such information within the government and to outside individuals." *Menchu v. U.S. Dep't of Health & Human Servs.*, 965 F. Supp. 2d 1238, 1243 (D. Or. 2013) (citing *Rouse v. U.S. Dep't of State*, 567 F.3d 408, 413 (9th Cir. 2009)). It provides a cause of action only against agencies of the U.S. government. *See* 5 U.S.C. § 552a(g)(1); 5 U.S.C. § 552(f)(1); *see also* 5 U.S.C. § 551(1). As explained by the Ninth Circuit, "The civil remedy provisions of the [Privacy Act] do not apply against private individuals, state agencies, private entities, or state and local officials[.]" *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1447 (9th Cir. 1985) (citations omitted); *see also Burch v. Pioneer Credit Recovery, Inc.*, 551 F.3d 122 (2d Cir. 2008) (third-party collection company that provided collection services for public and private clients, including federal agencies, was not an "agency" of the U.S. government subject to civil suits under the Privacy Act).

As Plaintiff alleges, Defendant is a private company. Am. Compl. ¶¶ 7, 63, ECF No. 135. It is not an "agency" as that term is defined in the Privacy Act, and no allegation in the Amended Complaint suggests otherwise. The Ninth Claim for Relief should be dismissed with prejudice because amendment would be futile.

7. Tenth Claim for Relief: Plaintiff Cannot State a Claim for Whistleblower Retaliation Under the ACA or Dodd-Frank.

The Tenth Claim for Relief asserts a violation of the whistleblower protection provision of the Affordable Care Act ("ACA"), 29 U.S.C. § 218c, which Plaintiff previously asserted in his original complaint. However, Plaintiff in his Amended Complaint for the first time also adds claims under Dodd-Frank. Specifically, Plaintiff cites 15 U.S.C. § 78u-6, 12 U.S.C. § 5567, and certain implementing regulations, 17 C.F.R. §§ 240.21F-1 to 240.21F-17. Plaintiff cannot maintain a claim in this action under any of these statutes, and the Tenth Claim for Relief should be dismissed with prejudice.

a. 29 U.S.C. § 218c

29 U.S.C. § 218c(a)(2) (part of the Fair Labor Standards Act) provides, in relevant part, that,

> [n]o employer shall discharge . . . any employee . . . because the employee . . . provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of this title[.]

Courts have held that the phrase "this title" in section 218c(a)(2) refers to Title II of the ACA, Pub. L. No. 111-148, 124 Stat. 119. *See, e.g., Banks v. Soc'y of St. Vincent De Paul*, 143 F. Supp. 3d 1097, 1103-04 (W.D. Wash. 2015); *Rosenfield v. GlobalTranz Enters., Inc.*, No. CV 11-02327-PHX-NVW, 2012 WL 2572984, at *1-4 (D. Ariz. July 2, 2012); *see also* ACA § 1558.

29 U.S.C. § 218c(b)(1) states that "[a]n employee who believes that he or she has been discharged or otherwise discriminated against by any employer in violation of this section may seek relief in accordance with the procedures, notifications, burdens of proof, remedies, and statutes of limitation set forth in section 2087(b) of Title 15." 15 U.S.C. § 2087(b), in turn, states, in relevant part:

> (b)(1) A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 180 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination and identifying the person responsible for such act. . . .
>
> (2)(A) . . . the Secretary shall initiate an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of the Secretary's findings. . . .
>
> . . . .
>
> (4) If the Secretary has not issued a final decision within 210 days after the filing of the complaint, or within 90 days after receiving a written determination, the complainant may bring an action at law or equity for *de novo* review in the appropriate district court of the United States with jurisdiction, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury.

The DOL's implementing regulations for whistleblower retaliation claims under the ACA are very similar to those that apply to such claims under SOX. *See* discussion *supra* Section II.E.1. Specifically, the regulations provide that an "employee who believes that he or she has been retaliated against in violation of [29 U.S.C. § 218c] . . . may file . . . a complaint alleging such retaliation," and that such complaint should be filed with a DOL OSHA office. *See* 29 C.F.R. § 1984.103(a), (d). A complainant thereafter may seek a hearing before an ALJ; then review of the ALJ's decision with the ARB; and then judicial review of the ARB's final order in the U.S. Court of Appeals for the appropriate circuit. *See* 29 C.F.R. §§ 1984.106, 1984.110, 1984.112(a). A complainant may bring an action for de novo review in the district court under two circumstances: "(1) Within 90 days after receiving a written determination under § 1984.105(a) provided that there has been no final decision of the Secretary; or (2) [i]f there has been no final decision of the Secretary within 210 days of the filing of the complaint." C.F.R. § 1984.114(a)(1), (2).

Accordingly, Section 218c requires a plaintiff to exhaust administrative remedies before filing a civil action in court. A plaintiff who has failed to exhaust his or her administrative remedies cannot maintain an action in the district court. *See, e.g., Richter v. Design at Work, LLC*, No. 14-CV-650, 2014 WL 3014972, at *4 (E.D.N.Y. July 3, 2014) (plaintiff failed to state a claim under section 218c where she did not allege that she exhausted her administrative remedies as required by the statute); *Wilson v. E.I. DuPont de Nemours & Co.*, No. 15-967-LPS, 2017 WL 960395, at *3-4 (D. Del. Mar. 13, 2017) (dismissing plaintiff's section 218c claim with prejudice where he failed to exhaust administrative remedies and therefore failed to state a claim upon which relief may be granted).

Just as Plaintiff failed to exhaust his administrative remedies with respect to his SOX whistleblower protection claim, Plaintiff also has failed to exhaust his administrative remedies with respect to his claim under the ACA. The Court takes judicial notice of the fact that Plaintiff has filed a complaint with the DOL, but because he waited until April 4, 2016 to do so—or 920 days after the termination of his employment, or 740 days after the expiration of his 180-day filing window—his complaint was summarily dismissed by the ALJ. Plaintiff has appealed that decision (which also relates to the SOX retaliation claim) to the ARB, and that proceeding should be allowed to run its course. None of the circumstances giving rise to de novo review in this Court is present, and this Court therefore should not entertain either this claim or Plaintiffs' SOX retaliation claims. Each claim should be dismissed with prejudice.

b. 15 U.S.C. § 78u-6

Another new claim the Amended Complaint asserts is for retaliation under 15 U.S.C. § 78u-6, which applies to information provided to the Securities and Exchange Commission ("SEC") about securities law violations. That statute makes it unlawful for an employer to "discharge,

demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower" in "providing information" to the SEC, "initiating, testifying in, or assisting in any investigation or judicial or administrative action of the [SEC] based upon or related to such information," or "making disclosures that are required or protected" under SOX or any other law subject to the jurisdiction of the SEC. *See* 15 U.S.C. § 78u-6(h)(1)(A).

A "whistleblower" is defined as "any individual who provides . . . information relating to a violation of the securities laws to the [SEC], in a manner established, by rule or regulation, by the [SEC]." *Id.* § 78u-6(a)(6); *see also* 17 C.F.R. § 240.21F-2. The term "securities laws" means the Securities Act of 1933, the Securities Exchange Act of 1934, SOX, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, and the Securities Investor Protection Act of 1970. *See* 15 U.S.C. § 78c(47).

The sole allegations in the Amended Complaint that could relate to this claim are in paragraphs 59, 60, and 65. These allegations are included in Plaintiff's Fifth and Sixth Claims and are incorporated by reference in the Tenth Claim, but the Tenth Claim contains no other factual allegations that could relate to alleged whistleblower retaliation for providing information about securities law violations to the SEC. Plaintiff vaguely alleges that he "provided information about, and participated in an investigation" relating to, what he describes as "accounting fraud and violations of securities statutes and regulations," and that he "has spoken with the" SEC "about insider trading and financial irregularities by [Defendant], including irregular accounting practices, including the keeping of alternative books and records that were unlawfully filed with federal agencies." Am. Compl. ¶¶ 59, 60, ECF No. 135. Plaintiff alleges no other details or information about what securities laws purportedly were violated, what information he allegedly provided to

the SEC, whether his communication with the SEC was done in a manner established by the SEC's rules or regulation, or whether Defendant knew about such reports before it terminated his employment.

Moreover, although Plaintiff does not allege any dates on which he claims he "spoke[]" with the SEC, paragraph 60 implies that it was on September 26, 2013, while Plaintiff was already was on administrative leave and the day before he was terminated. Considering these allegations along with Plaintiff's allegations that he "suspects" that his computer account was hacked, nothing in the Amended Complaint gives rise to a plausible inference that the termination of Plaintiff's employment had anything to do with any purported discussions Plaintiff had with the SEC.

Finally, any claim under 15 U.S.C. § 78u-6 is time-barred. A cause of action under the statute may not be brought "more than 6 years after the date on which the violation of subparagraph (A) occurred;" or "more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the employee alleging a violation of subparagraph (A)." 15 U.S.C. § 78u-6(h)(1)(B)(iii)(I)(aa), (bb). 15 U.S.C. § 78u-6(h)(1)(B)(iii)(I)(bb) has been held to constitute a statute of limitations, which bars a plaintiff from filing suit more than three years after the cause of action accrues. *See Igwe v. City of Miami*, No.: 1:15-cv-21603, 2016 WL 7671370, at *4 (S.D. Fla. Sept. 29, 2016).

As noted above, the Amended Complaint contains no factual allegations regarding whether, or when, Defendant purportedly discovered Plaintiff's reporting of SEC violations. However, Plaintiff alleges that he attempted to file whistleblower retaliation complaints, including under Dodd-Frank, on March 21, 2014. *See* Am. Compl., "Procedural Requirements," ¶ B, ECF No. 135. As determined by the ALJ in the DOL proceeding, none of those attempted "filings" complied with the administrative requirements for asserting claims under the whistleblower

protection provisions of SOX or the ACA. Further, the ALJ also determined that Plaintiff was not entitled to equitable tolling of his ACA or SOX retaliation claims because he was represented by counsel throughout the relevant time period following his termination. *See* Req. Judicial Notice Ex. C, 16-20, ECF No. 138; *see also Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010).

But if Plaintiff's allegations are to be taken as true, they indicate that he knew or should have known of the claim he now asserts under 15 U.S.C. § 78u-6 on or before March 21, 2014. Plaintiff waited until May 12, 2018—more than four years—to assert his claim. It is time-barred and should be dismissed with prejudice.

c. 12 U.S.C. § 5567

Plaintiff asserts another new claim in the Tenth Claim for Relief—this time, for alleged retaliation under section 1057 of Dodd-Frank, codified at 12 U.S.C. § 5567. This statute creates whistleblower protection for financial services employees and prohibits a "covered person" or "service provider" from terminating or discriminating against a "covered employee" for engaging in certain conduct, including, among other things, reporting information to an employer, the Consumer Financial Protection Bureau ("CFPB"), or any other state, local, or federal governmental authority that the employee reasonably believes to be a violation of law subject to the CFPB's jurisdiction or any rule, order, standard, or prohibition prescribed by the CFPB. *See* 12 U.S.C. § 5567(a); *see also Calderone v. Sonic Houston JLR, L.P.*, 879 F.3d 577, 580 (5th Cir. 2018) (Section 5567(a) precludes "covered persons and service providers from terminating employees who report information about violations of laws subject to the CFPB's jurisdiction.").

The laws subject to the CFPB's jurisdiction are listed in 12 U.S.C. § 5481(12), and include financial-related consumer protection laws, such as the Consumer Leasing Act of 1976, 15 U.S.C. § 1667, *et seq.*, the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.*, and the Truth in

Lending Act, 15 U.S.C. § 1601, *et seq.*, among others. A "covered person" is defined as any person (or affiliate) "that engages in offering or providing a consumer financial product or service," 12 U.S.C. § 5481(6)(A), and a "service provider" is a person that "provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service," 12 U.S.C. § 5481(26)(A). The term "consumer financial product or service" is defined in 12 U.S.C. § 5481(5) and (15), and generally includes certain financial products or services offered or provided for use by consumers for personal, family, or household purposes. Finally, a "covered employee" is "any individual performing tasks related to the offering or provision of a consumer financial product or service." 12 U.S.C. § 5567(b).

The Amended Complaint contains no allegations that suggest that Defendant—which Plaintiff alleges offered various health insurance plans, (*see* Am. Compl. ¶¶ 108-09, ECF No. 135)—is a "covered person" or "service provider" under the statute, or that it offered "a consumer financial product or service" that would make it subject to section 5567. Nor are there any allegations suggesting that Plaintiff ever complained about or reported any purported violations of any laws subject to the CFPB's jurisdiction to Defendant or the government or law enforcement authority. Finally, there are no allegations suggesting that Plaintiff—a former Data Warehouse manager—is a "covered employee" as defined in the statute. Put simply, Plaintiff has not alleged any facts suggesting that section 5567 applies to Defendant, and in fact, it does not.

Moreover, even if 12 U.S.C. § 5567 applies, it too includes an administrative exhaustion requirement that Plaintiff has not satisfied. Similar to the procedures that apply to claims under the SOX and ACA whistleblower protection provisions, Section 5567(c)(1) also requires a complainant to file a complaint with the Secretary of Labor no later than 180 days after the date on which the alleged violation occurs. The Amended Complaint contains no allegations that

Plaintiff ever filed a complaint for an alleged violation of 12 U.S.C. § 5567 with the DOL in a manner that complies with the statute and implementing regulations. This jurisdictional requirement is not satisfied by Plaintiff's vague allegations that BOLI should have, but apparently refused, to dually or cross-file his whistleblower retaliation complaints on or about March 21, 2014. *See* Am. Compl., "Procedural Requirements," ¶ B, ECF No. 135. Plaintiff's claim for a violation of 12 U.S.C. § 5567 should be dismissed with prejudice because amendment would be futile.

8. Twelfth Claim for Relief: Plaintiff Fails to State a Claim for Retaliation Under the FCA.

In his Twelfth Claim for Relief, Plaintiff asserts that Defendant retaliated against him in violation of the False Claims Act, 31 U.S.C. § 3730(h), after discovering that he was reporting purportedly fraudulent Medicaid and Medicare billing activities to various state and federal agencies. Am. Compl. ¶¶ 139-51, ECF No. 135. "To state a claim for retaliation, a plaintiff must demonstrate that: (1) he 'engaged in activity protected under the statute'; (2) the employer knew the plaintiff engaged in a protected activity; and (3) the employer discriminated against the plaintiff 'because he . . . engaged in protected activity.'" *United States ex rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890, 907 (9th Cir. 2017) (ellipsis in original) (quoting *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008)). Plaintiff's Amended Complaint fails to allege sufficient facts in support of the second element of the claim because it contains no support for the allegation that Defendant was aware of Plaintiff's alleged reports to government agencies.

"[U]nless the employer is aware that the employee is investigating fraud, the employer could not possess the retaliatory intent necessary to establish a violation of § 3730(h)." *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1269 (9th Cir. 1996) (citing *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 952 (5th Cir. 1994)). "'When seeking legal redress for

retaliatory discharge under the FCA, plaintiff has the burden of pleading facts which would demonstrate that defendants had been put on notice that plaintiff was either taking action in furtherance of a private *qui tam* action or assisting in an FCA action brought by the government.'" *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 567 (6th Cir. 2003) (quoting *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1522 (10th Cir. 1996)). "Several courts of appeals have held that the knowledge prong of § 3730 liability requires the employee *to put his employer on notice* of the 'distinct possibility' of False Claims Act litigation." *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 188 (3d Cir. 2001) (emphasis added; citation omitted); *see also Hopper*, 91 F.3d at 1269; *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 739 (D.C. Cir. 1998); *Childree v. UAP/GA AG CHEM, Inc.*, 92 F.3d 1140, 1146 (11th Cir. 1996); *Neal v. Honeywell Inc.*, 33 F.3d 860, 864 (7th Cir. 1994), *abrogated on other grounds by Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005).

Here, Plaintiff provides the conclusory allegation that "Defendants, at some point to be determined, discovered that plaintiff had reported that [sic] fraud, medical redlining, and HIPAA violations to state and federal agencies." Am. Compl. ¶ 148, ECF No. 135. While a plaintiff is required to sufficiently allege that he put a defendant on notice of his intent to file a FCA claim in order to show the defendant retaliated against him for that act, Plaintiff concedes that he does not know when Defendant purportedly learned of his alleged activities. As discussed above, Plaintiff states that he "suspects" that Defendant learned of these activities by hacking into his private email account using a "keystroke logger or private investigator." *Id.* ¶ 88. Unlike valid claims in other cases in which plaintiffs directly notified employers of fraudulent activity, Plaintiff asks the Court to entertain a speculative theory that Defendant learned of his intentions and activities through

hacking Plaintiff's email. Because he alleges no facts in support of these assumptions, his FCA retaliation claim fails and this claim should be dismissed with prejudice.

F. Seventh Claim for Relief: Plaintiff Fails to State a Claim for Workers' Compensation Discrimination.

Plaintiff's alleges that Defendant discriminated against him by refusing to pursue a workers' compensation claim on his behalf and then terminating him in retaliation for filing the claim. (*Id.* ¶¶ 83-86.) ORS 659A.040(1) provides that "[i]t is an unlawful employment practice for an employer to discriminate against a worker with respect to hire or tenure or any term or condition of employment because the worker has applied for benefits or invoked or utilized the procedures provided for in ORS chapter 656."

> To establish a *prima facie* case under that provision, a plaintiff must show "'(1) that the plaintiff invoked the workers' compensation system; (2) that the plaintiff was discriminated against in the tenure, terms or conditions of employment; and (3) that the employer discriminated against the plaintiff in the tenure or terms of employment because he or she invoked the workers' compensation system.

Williams v. Freightliner, LLC, 196 Or. App. 83, 90, 100 P.3d 1117 (2004) (quoting *Hardie v. Legacy Health Sys.*, 167 Or. App. 425, 433, 6 P.3d 531 (2000)). Plaintiff fails to allege facts sufficient to support any of the three required elements.

First, Plaintiff alleges no facts regarding his purported invocation of the workers' compensation system. He alleges that he "suffered injuries" and "reported such injuries" but fails to allege what the injuries were or how, when, and to whom he reported the alleged injuries. Am. Compl. ¶¶ 84-85, ECF No. 135. In his BOLI charge filed on January 13, 2014, Plaintiff in fact admits that he "did not file a Workers' Compensation claim." Req. Judicial Notice Ex. D, ⁋ 8, ECF No. 138.

Second, Plaintiff alleges no facts regarding Defendant's alleged rejection of Plaintiff's requests, such as how and when Defendant responded, who communicated the response, or whether any justification was given for the alleged rejection.

Finally, Plaintiff alleges no facts that would support the conclusory statement that he was terminated "in response to [his] use of the worker's compensation system." He provides no dates that would indicate proximity in time between his alleged requests and his termination, nor does he provide any other support for the contention that his termination was due to a request for workers' compensation. Without allegations of specific facts to support his conclusory statements, Plaintiff's Seventh Claim for Relief should be dismissed with prejudice.

G. Eighth Claim for Relief: Plaintiff Fails to State a Claim for Unlawful Search of Private Email.

Plaintiff's Eighth Claim asserts that Defendant violated the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030, by hacking into his personal email and cloud accounts to read correspondence with various state and federal agencies. Am. Compl. ¶ 88, ECF No. 135. This claim fails because Plaintiff fails to allege facts sufficient to state a claim, and his claim is not plausible.

The CFAA is primarily a criminal statute that prohibits unauthorized access to computers used in government or interstate commerce. In addition to criminal penalties, it grants a private right of action to "[a]ny person who suffers damage or loss by reason of a violation of" the statute. 18 U.S.C. § 1030(g). A civil action for monetary damages, however, may only be brought if the damages total at least $5,000. *Id.*

Plaintiff's claim should be dismissed for the initial reason that he has not pleaded all of the required elements. In fact, it is not clear which provision of the CFAA Plaintiff alleges was violated. The most likely candidate is section 1030(a)(2)(C), which prohibits intentionally

obtaining information from a computer used in interstate commerce either without authorization or by exceeding authorized access. *See also id.* § 1030(e)(2)(B) (defining "protected computer" as one "used in or affecting interstate or foreign commerce or communication"). To state a claim under this section, Plaintiff must allege that Defendant:

> (1) intentionally accessed a computer, (2) without authorization or exceeding authorized access, and that [it] (3) thereby obtained information (4) from any protected computer (if the conduct involved an interstate or foreign communication), and that (5) there was loss to one or more persons during any one-year period aggregating at least $5,000 in value.

LVRC Holdings LLC v. Brekka, 581 F.3d 1127, 1132 (9th Cir. 2009). Plaintiff's Amended Complaint fails to properly allege any of these elements.

First, Plaintiff does not allege which computer Defendant accessed. He asserts that Defendant logged into his "email and cloud accounts" but makes no allegation about which computer was used. If it was not a computer used in interstate or foreign communication, it is not "protected" and therefore not subject to the statute's prohibition.

Second, Plaintiff does not allege that Defendant exceeded its authorization in accessing the computer. He implies that Defendant did not have authority to access his email and cloud accounts, but the statute protects access to computers, not web-based services. In *Owen v. Cigna*, the only court to consider the question held that allegations of an employer's unauthorized access of a former employee's personal email account did not state a claim under the CFAA because the computer belonged to the employer and "the CFAA is aimed at unauthorized access to computers, not unauthorized access to web-based accounts." 188 F. Supp. 3d 790, 793 (N.D. Ill. 2016); *see also Cenveo, Inc. v. Rao*, 659 F. Supp. 2d 312, 317 (D. Conn. 2009) (citing 18 U.S.C. § 1030(e)(6)) (dismissing CFAA claim because the plaintiff failed to allege that the confidential and proprietary information was *in the computer*).

Third, Plaintiff has not alleged a loss of at least $5,000, which is required in order to maintain a civil action under section 1030(g). He asserts entitlement "to recovery of such damages as alleged herein or as may be provided under the statutory violation alleged," but fails to quantify those damages. Am. Compl. ¶ 90, ECF No. 135. Even if Plaintiff had alleged an amount higher than $5,000, his claim would still fail because his purported damages arise out of his termination rather than any alleged intrusion into his email. The CFAA defines "loss" as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." 18 U.S.C. § 1030(e)(11). Plaintiff's prayer seeks damages solely for lost wages and medical expenses, but the statute only allows recovery of revenue lost "because of interruption of service." *Id.* To the extent Plaintiff alleges lost wages or increased medical expenses, those losses arose from his termination, which is distinct from the alleged intrusion into his email.

In *Nexans Wires S.A. v. Sark-USA, Inc.*, the Southern District of New York held that damages resulting from the defendant's *use* of information gained through unauthorized access did not constitute "loss" under the statute: "'How [the defendant] uses the [ ] data, once extracted, has no bearing on whether [defendant] has impaired the availability or integrity of [plaintiff's] data or computer systems in extracting it.'" 319 F. Supp. 2d 468, 477 (S.D.N.Y. 2004) (brackets in original) (quoting *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238, 252 n.12 (S.D.N.Y. 2000), *aff'd*, 356 F.3d 393 (2d Cir. 2004)), *aff'd*, 166 F. App'x 559 (2d Cir. 2006). "[T]he loss of business due to defendants' eventual use of the information, rather than a loss of business because of computer impairment, was too far removed from computer damage to count toward the jurisdictional threshold." *Id.* Likewise here, accepting as true Plaintiff's allegation that Defendant

terminated him because of information it found in his private email, any losses resulting from the termination are too far removed from the alleged intrusion to constitute "loss" under the statute.

Even if Plaintiff had pleaded all of the required elements, his claim would still fail because it is not plausible on its face. *See Chavez*, 683 F.3d at 1108-09 (citing *Iqbal*, 556 U.S. at 678-79) (courts use common sense to discount implausible claims in order to protect from needless expense). Plaintiff's claim is implausible because he provides no explanation for how Defendant gained access to his private email and cloud accounts. He alleges that he "suspects" that Defendant "used a keystroke logger or private investigator to discover his login name and password." Am. Compl. ¶ 88, ECF No. 135. This type of pure speculation, however, cannot form the basis of a claim for relief. *See Dahlia*, 735 F.3d at 1076 ("[I]t is within [the Court's] wheelhouse to reject, as implausible, allegations that are too speculative to warrant further factual development."). Absent an allegation of a reasonable basis for the belief that Defendant hacked into Plaintiff's email, Plaintiff's Eighth Claim should be dismissed with prejudice.

H. Eleventh Claim for Relief: Plaintiff Fails to State a Claim for Defamation.

Plaintiff's Eleventh Claim seeks damages for defamation and "criminal altering and creating of documents in support of defamation" in violation of Oregon Revised Statute 135.733. Am. Compl. ¶¶ 128-38, ECF No. 135. This claim fails for the following reasons: (1) Plaintiff fails to allege sufficient facts to state a claim for relief; (2) the defamation claim is barred by the statute of limitations; and (3) the referenced statutes are criminal provisions that do not provide a private right of action.

"To establish a claim for defamation, a plaintiff must show that a defendant made a defamatory statement about the plaintiff and published the statement to a third party." *Neumann v. Liles*, 358 Or. 706, 711, 369 P.3d 1117 (2016) (citing *Wallulis v. Dymowski*, 323 Or. 337, 342-43,

918 P.2d 755 (1996)). As an initial matter, Plaintiff fails to allege basic facts related to the purportedly defamatory statements. "While the Ninth Circuit has not stated explicitly with what level of specificity plaintiffs must state their claims involving defamation," it has suggested that the plaintiff must allege "'the precise statements alleged to be false and defamatory, who made them and when.'" *Harris v. City of Seattle*, 315 F. Supp. 2d 1112, 1123-24 (W.D. Wash. 2004) (quoting *Flowers v. Carville*, 310 F.3d 1118, 1130-31 (9th Cir. 2002)), *aff'd*, 152 F. App'x 565 (9th Cir. 2005). Here, Plaintiff uses general descriptions and conclusory language, alleging that "Defendant" created "false unsigned statements," "spread untrue rumors," and made "slanderous assertions," but fails to allege the content of the purported statements. Am. Compl. ¶¶ 129-30, 136, ECF No. 135. As an initial matter, it is not enough to allege that a statement is false because, to be actionable, a statement must be both false *and* defamatory. *Reesman v. Highfill*, 327 Or 597, 603, 965 P2d 1030 (1998). Furthermore, Plaintiff's general allegations do not detail *who* made the statements, *what* was said, or *when*, *where*, or *to whom* they were made.[9] Without this basic information, these allegations cannot support a claim for defamation. [10]

[9] Plaintiff's claim that false statements were "used as evidence in state court proceedings" (Am. Compl. ⁋ 129, ECF No. 135) cannot form the basis of a defamation claim because such statements are absolutely privileged. *See Allen v. Nw. Permanente, P.C.*, No. 3:12-cv-0402-ST, 2013 WL 865967, at *10 (D. Or. Jan. 2, 2013) (recognizing that it is well established that "'statements made as part of judicial and quasi-judicial proceedings are absolutely privileged'" (quoting *DeLong v. Yu Enters., Inc.*, 334 Or. 166, 171, 47 P.3d 8 (2002))); *deParrie v. Hanzo*, No. CIV. 99-987-HA, 2000 WL 900485, at *9 (D. Or. Mar. 6, 2000) (defendant was entitled to dismissal of defamation claim because she "enjoyed an 'absolute privilege' in making statements in the course of judicial proceedings," and stating that "[a]n 'absolute privilege' bars a claim for defamation" (quoting *Troutman v. Erlandson*, 286 Or. 3, 7, 593 P.2d 793 (1979); *Wallulis*, 323 Or. at 347-48)).

[10] *See, e.g.*, *White v. Hansen*, No. C 05-784 SBA, 2005 WL 1806367, at *9 (N.D. Cal. July 28, 2005) (dismissing slander claim for failure to identify specific statements or indicate to whom statements were made); *Ahmed v. Gelfand*, 160 F. Supp. 2d 408, 416 (E.D.N.Y. 2001) (defamation claim must "merely state the substance of the purported communication, who made the communication, when it was made, and to whom it was communicated"); *Celli v. Shoell*, 995 F. Supp. 1337, 1346 (D. Utah 1998) ("[T]he complaint fails to identify any specific defamatory statements made by the defendants or when, where, or to whom any defamatory statements were made."); *Tiernan v. Fujitsu Imaging Sys. of Am., Inc.*, No. 88 C 7445, 1989 WL 91879 (N.D. Ill. Aug. 9, 1989) (dismissing slander claim because speaker was not identified); *Weeks v. Distinctive Appliance Corp.*, No. 84 C 9716, 1985 WL 3536 (N.D. Ill. Oct. 24, 1985) (defamation claim failed where plaintiff failed to identify when, where, or to whom statements were made or the substance of the defamatory statements); *Leo Winter Assocs., Inc. v. Dep't of Health & Human Servs.*, 497 F. Supp. 429, 432 (D.D.C. 1980) (holding that defamation claims failed where complaint was "replete with generalities but devoid of specific defamatory comments").

The only allegation that comes close to providing sufficient facts is Plaintiff's assertion that "Defendant executives informed a prospective employer that plaintiff was a 'sexual predator' in front of witnesses." Am. Compl. ¶ 133, ECF No. 135. But even that allegation fails "to specifically identify who made the statements, when they were made and to whom they were made." *PAI Corp. v. Integrated Sci. Sols., Inc.*, No. C-06-5349 JSW(JCS), 2007 WL 1229329, at *9 (N.D. Cal. Apr. 25, 2007). The failure to provide these basic facts is fatal to Plaintiff's claim. *Id.*

Even if Plaintiff had alleged sufficient facts to support his claim, they would nonetheless be barred by the statute of limitations. A defamation claim is subject to a one-year statute of limitations, which begins to run on the date of the publication of the false or defamatory statement. ORS 12.120(2); *Allen v. Nw. Permanente, P.C.*, No. 3:12-cv-0402-ST, 2013 WL 865967, at *4 (D. Or. Jan. 2, 2013); *Kraemer v. Harding*, 159 Or. App. 90, 103, 976 P.2d 1160 (1999). Though Plaintiff does not provide dates for any of the allegedly defamatory statements, they are all alleged in conjunction with his employment at Defendant, which was terminated on September 27, 2013. Am. Compl. ¶ 9, ECF No. 135. Plaintiff therefore had until September 27, 2014, at the latest, to bring his defamation claims, but he did not file this action until June 4, 2015. Therefore, any claims based on statements that occurred at or near the time he was employed at Defendant are time-barred.

Finally, Plaintiff cites two statutes in support of his defamation claim, but both are criminal statutes that do not provide a private right of action. Plaintiff cites to Oregon Revised Statute 135.733, but Chapter 135 is titled "Arraignment and Pretrial Provisions." In particular, Oregon Revised Statute 135.733 "identif[ies] pleading requirements for 'criminal defamation'" and is part of "a group of several other statutes, all addressing pleading requirements for accusatory

instruments," such as criminal indictments. *State v. Hill*, 277 Or. App. 751, 765, 373 P.3d 162, *rev. denied*, 360 Or. 568 (2016). There is no basis for a private litigant to bring a civil claim under this statute. Likewise, while Section 1512(c) of SOX makes it a crime to destroy or alter a document "with the intent to impair the object's integrity or availability for use in an official proceeding, 18 U.S.C. § 1512(c), the statute does not provide a private right of action. *Shahin v. Darling*, 606 F. Supp. 2d 525, 538 (D. Del. 2009) (citing *Gipson v. Callahan*, 18 F. Supp. 2d 662, 668 (W.D. Tex. 1997)), *aff'd*, 350 F. App'x 605 (3d Cir. 2009). For these reasons, Plaintiff's Eleventh Claim should be dismissed with prejudice because amendment would be futile.

RECOMMENDATION

For the reasons discussed above, this Court recommends that Plaintiff's claims be dismissed with prejudice. The Court recommends that specific claims be dismissed with prejudice because amendment would be futile.[11] In addition, the Court recommends that all remaining claims be dismissed with prejudice because Plaintiff has had ample time and opportunity to move the Court for leave to amend his complaint after filing his Amended Complaint May 18, 2018. Since filing the Amended Complaint, Plaintiff has filed hundreds of pages of documents through 32 separate filings. Plaintiff has had five attorneys during the nearly four years this case has been litigated. Further delay would unduly prejudice Defendant. For these reasons, the Court recommends that all of Plaintiff's remaining claims also be dismissed with prejudice.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation

[11] The following claims should be dismissed with prejudice: Claim One, Claim 3 Count 1 and Count 3, Claim Four, Claim 5, Claim 6, Claim 9, Claim 10, and Claim 11.

within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determination of the Magistrate Judge will be considered as a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to this recommendation.

DATED this 25th day of March 2019.

s/ Mustafa T. Kasubhai
MUSTAFA T. KASUBHAI
United States Magistrate Judge